Supreme Court, U.S.
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In the Supreme Court
of the
United States

October Term, 1961

No. 641

[redacted] Lucas, Helen Lucas, Ophelia D. [redacted], Executors and Ophelia D. [redacted], as Executrix of the estate of [redacted] H. Lucas II, Ophelia Denison Lucas and James Lucas, minors,

Petitioners,

vs.

L. S. Hand, First Doe, Second Doe, Third Doe, Fourth Doe and Fifth Doe,

Respondents.

PETITIONERS' REPLY BRIEF

Reginald G. Hearn,
[redacted] California Street,
San Francisco 11, California,
Attorney for Petitioners.

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In the Supreme Court
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OCTOBER TERM, 1961

No. 641

ROBERT LUCAS, HELEN LUCAS, CYRENE D. LUCAS, ANNETTE LUCAS and CYRENE D. LUCAS, as guardian of the estates of Robert B. Lucas II, Cyrene Denison Lucas and James Lucas, minors,

Petitioners,

vs.

L. S. HAMM, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE and FIFTH DOE,

Respondents.

PETITIONERS' REPLY BRIEF

I.

RESPONDENT INCORRECTLY CITES QUESTIONS PRESENTED

Respondent emphasizes the point that the federal question was raised for the first time in a petition for

rehearing in the highest court of the State of California. The question of denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution was *immediately* raised by petitioners when for the first time in the entire course of litigation and in an unexpected manner the Supreme Court of the State of California functioning as an appellate tribunal departed from the opinions and theories of the trial and lower appellate courts and decided de novo, without any evidence before it, that children were not protected by the Fourteenth Amendment to the Constitution of the United States if their adversary had the good fortune to be a lawyer. (Petition herein, pages 9 and 10, and appendices, 1, 2 and 3 thereto.)

The second part of the claimed question presented states erroneously that the action was for negligence. It is to be emphasized that this is not an action limited to negligence but on the contrary relates to breach of contract also. The judgment of the trial court sustained a demurrer without leave to amend without any evidence before it upon the sole ground that the trial judge believed (erroneously as was later established) that a beneficiary of a will could not sue a lawyer for damages resulting from an error in draftsmanship either upon the theory of tort or contract. The opinion of the trial judge is clearly set forth in the petition and in the record and is appended to the petition as appendix 1 thereof. The District Court of Appeal reversed the aforesaid opinion and judgment and unequivocally stated that such

an action was proper both upon the theory of tort and contract. (Appendix 3 of petition.) The Supreme Court of the State of California stated that such an action was proper both upon the theory of tort and upon the theory of contract, but thereafter incorporated by reference the wisdom of a Harvard law professor as a substitute for the legislative function. (Appendix 4 of petition.) Therefore, petitioners herein inquire as follows: Under what law of what state were they prevented from having a trial for the purpose of introducing evidence upon the tort and contract in question? This is a case of first impression and there never has been a case decided without any evidence wherein it has been held that the law of future interests as a matter of law is too difficult for a lawyer to understand. The children, petitioners herein, were not only denied the opportunity to prove negligence, but in addition thereto they were denied the opportunity to prove by competent evidence the terms and provisions of the contract, the breach of which was admitted by respondent lawyer.

II.

28 USCA SECTION 1257 AUTHORIZES REVIEW IN THIS CASE

It is clear that the Supreme Court of the State of California actually decided the question relating to denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution for the first time. (Appendices 1 through 5 of peti-

tion.) The trial court merely said that a beneficiary of a will could not sue the draftsman thereof. (Appendix 1 of petition.) On appeal, the District Court of Appeal said the beneficiary could sue a lawyer on the theories of tort and contract. Hence, for the first time, a new law was established in the State of California. (Appendix 3 of petition.) In answer to the plea for professional immunity requested by respondent herein in the arguments propounded before the District Court of Appeal, the aforesaid tribunal unanimously stated in part as follows:

> "Respondent earnestly contends that even if the lack of privity does not bar suit against him, nevertheless no actionable negligence was pleaded. The argument, as we understand it, is that the law with respect to the rules against perpetuities and the suspension of the power of alienation is so difficult that the ordinary lawyer who errs in their applicability cannot be charged with negligence. We agree the subject is difficult, but the law today has its specialties, and even as the general practitioner in medicine must seek the aid of the specialist in his profession, so the general practitioner in law, when faced with a problem beyond his capabilities, must turn to the expert in his profession to the end that his client is properly served. Further, *this argument is pointless here*, for in the *Estate of Campbell* (1938), 28 C.A. 2d 102, 106, a similar provision was held to violate the rules against perpetuities and suspension of the power of alienation. All that the respondent Hamm had to do in the present case was to examine the decisions of the courts of his own state and he would have had the

answer to the problem he now says is confused and uncertain." (Appendix 3, petition, page xiv.)

The Supreme Court of the State of California said that the beneficiaries of a will can sue the lawyer on the theory of tort and contract, but that the subject of future interests was too difficult to understand, at least in the opinion of Professor Leach of Harvard University, which opinion was adopted and, therefore, without permitting any evidence on the subject, the actions should be and were dismissed. The subjects of negligence and breach of contract are, of course, relative and depend for their solution upon questions of fact. This is in accordance with basic principles of American law and the existing law in the State of California. (Petition and cases cited therein.)

The Supreme Court of the State of California is constitutionally constituted as an appellate tribunal. It is not a fact-finding tribunal. Therefore, its decision concerning questions of fact without any evidence before it is void on its face because the Supreme Court lacked jurisdiction in this particular case to decide questions which, from the inception of our system of jurisprudence, depend for their solution upon facts established incident to procedural safeguards. This was the first time in the entire proceeding described herein that the federal question had been presented. It was a complete surprise. There was no precedent thereto. There are no prior cases concerning this subject. Petitioners immediately raised the federal question within the time required

by law. (See record presented herewith and appendix 5 attached to petition.)

As stated in the case of *Granis v. Ordean*, 234 U.S. 385, it was the decision of the Supreme Court of the State of California that ran counter to the constitutional right of petitioners herein. The prior decisions of the trial court and the District Court of Appeal at no time ran counter to their said rights.

III.

BASIC RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ARE DIRECTLY INVOLVED HEREIN

Respondent misstates the record by alleging that petitioners merely pleaded negligence in their causes of action. The statement of the case, as set forth on page 4 et seq. of the petition, correctly shows the nature of the proceedings. Also, the record presented herewith indicates that petitioners alleged three separate and distinct causes of action. The first cause of action was predicated upon negligence relating to carelessness in drafting a will and codicils thereto. The second cause of action related to breaches of contract wherein a third-party beneficiary contract and supplements thereto entered into by and between the testator and the respondent lawyer for the benefit of petitioners as beneficiaries under testamentary instruments were continuously breached. The third cause of action related to carelessness and negligence relative to the conduct of respondent herein as counsel for a $3,000,000 estate.

These causes of action were pleaded in conformity with the applicable procedural requirements as imposed by the legislature of the State of California. Each cause of action in and of itself is, in accordance with the laws of the State of California, separate, distinct and properly pleaded. The words "negligence", "breach of contract" and "carelessness" are relative and the element of relativity, is of course, predicated upon circumstances which, in turn, can only be proved by competent evidence introduced pursuant to procedural safeguards. The word "relative" means relative to fact and fact can only be established by evidence, and there was a total deprivation of the privilege of introducing any evidence occasioned by the decision of the Supreme Court of California in this case.

Inasmuch as the trial court erroneously believed that a beneficiary under a will could not sue a lawyer and based its decision solely upon that point (appendix 1, petition), the first time that the question of whether or not the law of future interests should have been too difficult for this particular respondent was decided adversely to petitioners by a tribunal was the decision of the Supreme Court of the State of California. Aside from the fact that no evidence was permitted relative to this question of fact, the Supreme Court of California lacks jurisdiction over this particular question because constitutionally it is constituted an appellate tribunal and it cannot under any law or procedural rule existing in the State of California sit de novo as a trial court without any evidence before it.

As the learned B. E. Witkin, noted California author in the field of jurisprudence, stated in his 1961 supplement to California Procedure:

> "It would appear from the opinion in the case of *Lucas v. Hamm* that, in actions against an attorney, negligence is not in any meaningful sense a question of fact for the lower court, but is one of law on which the appellate court exercises an independent judgment."

He further stated:

> "In reaching this conclusion the court almost takes the position that no lawyer can be held responsible for mistakes in regard to perpetuities and suspension of alienation." Witkin, California Procedure, Vol. 1 1961 Supp.—Attorneys—Section 59A, Page 27.

It is obvious that there is no legal precedent for this unique decision, that there is a total absence of any reason therefor and that the impact of the decision is to shatter constitutional safeguards at the expense of children for the benefit of the members of the legal profession. This profession is by the very nature of things the fiduciary entrusted with the preservation of sacred constitutional guarantees. In propria causa nemo judex—no one can be a judge in his own cause.

IV.

THE CASES CITED BY RESPONDENT ARE NOT APPLICABLE TO HIS POSITION HEREIN

The case of *Consolidated Turnpike Co. v. Norfolk O.V.R. Co.*, 228 U.S. 326 at 334; *Hanson v. Denckla*, 357 U.S. 235, and *American Surety Co. v. Baldwin*, 287 U.S. 156, are clearly not applicable because as has been indicated herein the first time the violation in question was caused by a court, was at the time the Supreme Court of the State of California attempted to exceed its jurisdiction and decide a question of fact without any evidence before it concerning a case of first impression in the jurisprudence of the United States. The case of *Granis v. Ordean*, 234 U.S. 385, is in favor of the position asserted by petitioners herein. As stated therein, it was the decision of the Supreme Court of the State of California that first ran counter to the constitutional rights of petitioners herein.

The case of *Iowa Central Railway Company v. State of Iowa*, 160 U.S. 389, 393, is not in point. In this case, the petitioners herein assert the right to a trial, the right to produce evidence at the trial, the right to produce evidence at a trial before a tribunal with jurisdiction conferred by the Constitution of the State of California, as distinguished from an appellate tribunal constitutionally established to review decisions of a trial court after evidence has been adduced. Whether the trial which petitioners demand is by a court or a jury is beside the point at this particular time. Petitioners merely want a trial.

They want their day in court in a court constitutionally established to have jurisdiction upon such a controversy and a court constitutionally established wherein evidence can be adduced and, of final significance, they wish the opportunity to present evidence. In the *Iowa* case cited by respondent, the question related to whether or not the petitioner for the writ of certiorari was entitled to a jury as distinguished from a court trial. This distinguishing characteristic is not present in this case. Petitioners herein merely want a trial. It is their position that the Supreme Court of the State of California lacks jurisdiction of the subject matter and in its proceeding it violated the constitutional rights guaranteed petitioners herein. This case requires a *fair* opportunity to be heard, to wit, a trial. The *Iowa* case merely stated that the Constitution merely guaranteed a fair opportunity for hearing. In the aforesaid *Iowa* case, the court stated in part as follows:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what legal process legal rights may be asserted or legal obligations be enforced *provided* the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

It is clear, therefore, that the Supreme Court of the State of California in this particular case was completely without jurisdiction in its decision. It is an appellate tribunal and not a trial court. There was no evidence introduced in this case. There is no precedent

for the procedural aspect thereof and there is no precedent legally for the strange and shocking conclusion reached by the Supreme Court of the State of California. This is a case of first impression in the jurisprudence of the world. Disposition thereof should be in conformity with guaranteed democratic principles.

For the foregoing re. sons, it is respectfully submitted that the Supreme Court of the United States should issue a writ of certiorari in order that this case may be reconsidered and decided commensurate with principles of law applicable thereto and in accordance with the constitutional guarantees incident to the Fourteenth Amendment to the United States Constitution.

Dated, January 20, 1962.

REGINALD G. HEARN,
Attorney for Petitioners.